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No. 89-1028

Supreme Court, U.S.
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In The Supreme Court of the United States October Term, 1989

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS

JAMES S. WHITEHEAD
(Counsel of Record)
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

Attorneys for Petitioner
CSX TRANSPORTATION, INC.

September 27, 1990

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INTRODUCTION

Respondent Brotherhood of Railway Carmen ("BRC") filed a Motion to Dismiss on May 24, 1990, asking the Court to dismiss the writs of certiorari granted herein on March 26, 1990,[1] on the ground that the issue presented in this case — whether

[1] The Motion to Dismiss was also filed by Respondent American Train Dispatchers' Association ("ATDA") in *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, No. 89-1027 (U.S.).

§ 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a), immunizes consolidating rail carriers from compliance with obligations arising from Railway Labor Act ("RLA") collective bargaining agreements — "has been rendered moot by recent actions of the Interstate Commerce Commission." Motion to Dismiss at 2. The "recent actions" on which BRC relied were a press release issued by the Commission on May 17, 1990, purporting to summarize the Commission's yet-to-be-issued decision on remand from the United States Court of Appeals for the District of Columbia Circuit in this case and the comments of the Commissioners at the public voting conferences concerning such decision.

Petitioner CSX Transportation, Inc. ("CSXT") and the Federal Respondents promptly filed their responses, opposing BRC's motion.[2] On June 20, 1990, this Court deferred further consideration of BRC's motion for 120 days. On September 19, 1990, BRC and ATDA filed a Supplemental Memorandum in support of their pending motion, in which they continue to assert that, in light of the Commission's decision, "the meaning of Section 11341(a) becomes virtually irrelevant." Supp. Mem. at 4.

There have been several developments in this case that have occurred since CSXT filed its initial response to BRC's motion that CSXT submits this Court should consider in ruling on that motion. In particular, they include: (1) the Commission's remand decision in *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc. ("CSX Corp. — Control")*, 6 I.C.C.2d 715, served June 21, 1990;[3] (2) the Commission's July 19, 1990, decision in *CSX Corp. — Control*, denying petitions for stays filed by CSXT, N&W and Southern;[4] and (3) the Petition in Support of Motion for Order to Interstate Commerce Commission to Conform Decision on Remand to Prior Court of

[2] Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern"), Petitioners in No. 89-1027, similarly opposed the identical motion in that case.

[3] The Federal Respondents have previously filed a copy of the Commission's decision with this Court.

[4] A copy of the Commission's decision is submitted herewith. App. 1a.

Appeals Decision, filed on August 6, 1990, by BRC and ATDA in the D.C. Circuit in *Brotherhood of Railway Carmen* v. *ICC*, Nos. 88-1724 and 88-1694.[5]

The Commission's two decisions, as well as the unions' petition to the D.C. Circuit, establish that the issue of the correct interpretation of ICA § 11341(a) and its application to obligations arising directly from RLA collective bargaining agreements remains very much alive and should be resolved by this Court. BRC's Motion to Dismiss should be denied.

A. The Commission's Decision on Remand.

On June 21, 1990, the Commission issued its decision on remand from the D.C. Circuit. In keeping with the Court of Appeals' mandate, the Commission acknowledged that it could not consider "the general question of the effect of § 11341(a) on the authority to modify existing contracts." 6 I.C.C.2d at 720. *See also* 6 I.C.C.2d at 722: "[I]n accordance with the opinion of the Court of Appeals, we do not here rely on § 11341 as a source of the authority to modify CBAs . . . ."; 6 I.C.C.2d at 745 (*semble*).

Instead, the Commission majority grounded its authority, and that of its arbitrators, to modify collective bargaining agreement provisions when necessary to permit ICC-approved rail consolidations on ICA § 11347 and the Commission's labor protective conditions imposed thereunder. 6 I.C.C.2d at 750-51. As the Commission observed, this was "an area the *Carmen* court did not reach." *Ibid.; see also* 6 I.C.C.2d at 729. In addition, the Commission held to its position that Congress had granted it authority under ICA § 11341(a) to exempt mergers and consolidations from the bargaining procedures of the RLA. 6 I.C.C.2d at 754. Thus, the Commission relied on § 11341 "as furnishing authority to replace RLA procedures, but in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modifications of CBAs." 6 I.C.C.2d at 756 n.34.

Despite its compliance with the mandate of the court of appeals, the Commission majority noted that it is currently arguing before this Court in the instant case that § 11341(a) does

[5] The unions' petition is submitted herewith. App. 14a.

in fact authorize the supersession of collective bargaining agreement terms inconsistent with Commission-approved consolidations:

> [I]n [Nos. 89-1027 and 89-1028] we are advancing the argument that the Court of Appeals was in error on this point and that § 11341 does furnish a further basis for modification of CBAs to the extent permissible under § 11347 and the labor protective conditions.

6 I.C.C.2d at 756 n.34.

B. The Commission's Decision Denying the Railroads' Requests for a Stay.

Following the issuance of the Commission's remand decision, CSXT, N&W, and Southern filed petitions with the Commission seeking stays of the effective date of the remand decision since in it the Commission had vacated the arbitrated implementing agreement. The Commission rejected these requests in its July 19, 1990, decision. But, in doing so, it acknowledged that its reliance on ICA § 11347 as the source of its authority to supersede collective bargaining agreement terms had resulted from the Court of Appeals' mandate. It also indicated that, were the D. C. Circuit's interpretation of § 11341(a) to be reversed by this Court, the Commission would have to reconsider its analysis. As the Commission explained:

> [The Railroads] appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

App. 10a; emphasis in original. In addition, contrary to the Respondents' assertions in their Supplemental Memorandum, the Commission explained that it could not disagree with CSXT's statement that:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

App. 10a n. 9.[6]

C. The Unions' Petition to the D.C. Circuit.

On August 6, 1990, BRC and ATDA filed a motion with the D.C. Circuit seeking the issuance of a special writ requiring the Commission to conform its ruling on remand to the judgment of the Court in *Brotherhood of Railway Carmen* v. *ICC*, 880 F.2d 562 (D.C. Cir. 1989), *cert. granted*, Nos. 89-1027, 89-1028 (March 26, 1990). In their petition in support of this motion, the unions argued that the Commission's decision "is plainly contrary to [the D.C. Circuit's] express findings and rationale in the *Carmen* case on the ICC's authority to abrogate Railway Labor Act agreements." App. 15a.

The unions alleged that the Commission had paid "lip service" to the D.C. Circuit's mandate, basing the authority to modify collective bargaining agreements on § 11347, rather than § 11341. App. 25a-26a. The unions argued to the D.C. Circuit that the Commission's decision on remand was inconsistent with that mandate because the ultimate source of the Commission's authority to supersede such agreements can only be § 11341(a):

> [T]he necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA, must be Section 11341(a) and this court has already addressed the scope of that section's authority with respect to RLA agreements.

App. 26a.[7]

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[6] Still pending before the Commission are petitions filed by CSXT, N&W, and Southern asking the Commission to reopen, reconsider, and clarify its remand decision.

[7] On September 10, 1990, the D.C. Circuit denied the unions' motion. In addition, on July 31, 1990, the Court of Appeals granted ICC's motion to withdraw its still-pending petition for rehearing. Accordingly, as the July 31, 1990, order provided, "These cases are now terminated."

ARGUMENT

BRC's claim that the issue of the proper interpretation of ICA § 11341(a) has been rendered moot by the ICC's decision on remand is belied by that decision, the Commission's subsequent decision on the carriers' stay requests, and BRC's own filing with the D.C. Circuit. Each establishes that there continues to be a material controversy over the authority conferred on consolidating rail carriers by that section.

In its Motion to Dismiss, BRC speculated, on the basis of the ICC press release, that:

> The Commission evidently has determined that regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights.

Motion to Dismiss at 5. The actual Commission decision, however, establishes that its reliance on § 11347 as the source of the authority to modify collective bargaining agreement terms was forced on it by the restrictions of the Court of Appeals' mandate and the "law of the case".[8] As the Commission noted in that decision, it has filed a brief with this Court in support of CSXT, arguing that the D.C. Circuit's interpretation of § 11341(a) is erroneous. Moreover, the Commission continues to rely on § 11341(a) to override the RLA.

The continuing importance of the proper interpretation of § 11341(a) was further emphasized by the Commission in its July 19, 1990, decision denying the railroads' requests for a stay. While the Commission declined to issue such a stay, it acknowledged that its June 21, 1990, decision on remand would have to be reconsidered and the analysis contained therein revised if this Court were to reverse the D.C. Circuit's interpretation of § 11341(a), as CSXT and the Federal Respondents have argued.

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[8] Mere compliance by the Commission with the D. C. Circuit's mandate does not moot consideration by this Court of the correctness of the Court of Appeals' decision. *See Schweiker* v. *Gray Panthers*, 453 U.S. 34, 42 n.12 (1981); *Maher* v. *Roe*, 432 U.S. 464, 468-69 n.4 (1977); *cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948).

BRC, in its Supplemental Memorandum at pp. 3-5, relies on various statements from the Commission's June 21, 1990, decision whereby the Commission, under the constraints of the Court of Appeals' decision, suggested that § 11341(a) authority would be limited by § 11347. But BRC conveniently avoids any reference to the Commission's July 19, 1990, decision, since that decision exposes the fallacy underlying BRC's arguments.

Finally, BRC itself has disavowed its claim in its Motion to Dismiss at 5 that "the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes." As noted above, BRC argued in its August 6, 1990, filing with the D.C. Circuit, less than two months ago, that *only* § 11341(a) can provide "the necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA." App. 26a. In other words, BRC contended that, since the Court of Appeals found that the Commission did not have authority under § 11341(a), the Commission was precluded from finding that authority in § 11347. In light of this, BRC can hardly be heard now to suggest to this Court that the correct interpretation of § 11341(a) is of only academic interest, since according to BRC it is the only issue!

BRC's mootness argument is thus totally disingenuous. BRC continues to maintain that § 11341(a) does not provide authority to modify collective bargaining agreements, yet it argues that Supreme Court consideration of that seminal issue is moot because the ICC has found such authority to exist under § 11347 as well. At the same time, however, BRC argues that § 11347 does not provide statutory authorization to modify collective bargaining agreements because such authority can only be based in § 11341(a). BRC cannot have it both ways. Under guise of a mootness argument, BRC asks this Court to permit an erroneous appellate decision to remain in place so that BRC can use it to further restrict operation of the Interstate Commerce Act. BRC should not be permitted to succeed in this effort.

BRC's assertion that the issue of the Commission's authority under § 11341(a) to change the terms of a collective bargaining agreement is now moot is also clearly wrong in light of the effects of the Court of Appeals' decision on the Commission's decision on remand. The Court of Appeals' decision has resulted in the

Commission (1) departing from its prior view of its authority to change collective bargaining agreements; (2) formulating a more limited pronouncement of that authority; and (3) vacating the arbitrated implementing agreement that previously had been affirmed by the Commission. In short, the instrument by which CSXT had coordinated the Waycross car repair work into Raceland has been abrogated, and CSXT has been told that the coordination process, thought to have been completed more than three years ago, must now start over. All of these adverse results flow directly from the Court of Appeals' holding on the issue of the Commission's authority under § 11341(a) to change the terms of a collective bargaining agreement. That is the issue which is now before this Court.

Accordingly, there is no basis for BRC's assertion that the issue presented in this case has become moot or that this Court should dismiss the writ of certiorari granted in either No. 89-1027 or No. 89-1028.

CONCLUSION

The Motion to Dismiss filed by Respondent Brotherhood of Railway Carmen should be denied.

Respectfully submitted,

JAMES S. WHITEHEAD
(Counsel of Record)
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

Attorneys for Petitioner
CSX TRANSPORTATION, INC.

September 27, 1990

APPENDIX

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DATE RELEASE
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JUL 20 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION — CONTROL —
CHESSIE SYSTEM, INC.
AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION — CONTROL —
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

Decided: July 19, 1990

On July 2, 1990, Norfolk & Western Railway Company and Southern Railway Company (jointly "N&W") filed a petition to stay the effectiveness of the commission decision served June 21, 1990 in these proceedings and reported at 6 I.C.C.2d 715 (the "June 21 Decision"). In that decision we reversed and vacated two arbitration awards and remanded the proceedings to the parties to continue the negotiation and arbitration procedures established under our labor protective conditions. 6 I.C.C.2d at 722, 757, 775.

N&W seeks a stay "pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v. American Train Dispatchers Association*, No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, No. 89-1028."[1] Alternatively, N&W seeks a stay pending disposition of a petition to reopen and for reconsideration of the June 21 Decision. N&W

[1] On March 26, 1990, the Supreme Court granted petitions for writs of certiorari in Nos. 89-1027 and 89-1028 to review the decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) (the *"Carmen"* decision). In *Carmen*, the court of appeals reversed our earlier decisions in these proceedings reported at 4 I.C.C.2d 641 and 1080. See discussion in the June 21 Decision, 6 I.C.C.2d at 729-30, 756 n. 34.

filed that petition on July 11, 1990. On the same date, N&W filed a petition for stay pending judicial review indicating that it intends to file a petition for review of the June 21 Decision "in a court of appeals." Pet. at 4.

On July 2, 1990, CSX Transportation, Inc. ("CSX") also filed a petition to stay the June 21 Decision. CSX seeks to stay the effectiveness of that decision until the Commission disposes of a petition for reconsideration and clarification. That petition was filed by CSX on July 11, 1990. In addition, CSX filed a petition for stay pending judicial review on July 11, 1990, indicating that it intends to seek review in the United States Court of Appeals for the District of Columbia Circuit.[2] The Brotherhood of Railway Carmen and the American Train Dispatchers' Association (jointly "Rail Labor") filed responses to the petitions for stay on July 9 and 16, 1990.

Petitioners have not demonstrated entitlement to a stay by reference to each of the four factors identified in the seminal decision of *Virginia Petroleum Jobbers Association v. FPC,* 259 F.2d 921, 925 (D.C.Cir. 1958):

(1) that there is a strong likelihood that the movant will prevail on the merits;[3]

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

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[2] We will consider the arguments in the two petitions for stay pending judicial review, although we question whether judicial review is available at this time since we are only ruling on the petitions for stay. *United Transportation Union v. ICC,* 871 F.2d 1114 (D.C. Cir. 1989) (judicial review of agency decision not available to party that has also filed a petition for reconsideration that remains pending before the agency); *ICG Concerned Workers Association v. United States,* 888 F.2d 1455 (D.C.Cir. 1989) (same).

[3] In *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977), the court of appeals held that in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits.

Analysis of the critical second factor essentially disposes of the stay petitions. Therefore, we first address whether petitioners have demonstrated that in the absence of a stay they will suffer irreparable harm.

I. IRREPARABLE HARM

Although the concept of irreparable harm does not lend itself to exact definition, there are several indisputable principles that guide us in our determination whether this requirement has been met. First, the anticipated injury complained of must not be speculative. As stated in *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 673-74 (D.C.Cir. 1985) (citations omitted; emphasis in orginals in decisions quoted):

> [T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.

The court of appeals went on to describe the nature of the showing required of a party seeking the extraordinary remedy of a stay pending review (*id.* at 674):

> [T]he [petitioner must] substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The [petitioner] must provide proof indicating the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the [petitioner] must show that the alleged harm will directly result from the action which the [petitioner] seeks to enjoin.

It is also well settled that economic loss of itself does not constitute irreparable harm. In *Sampson v. Murray,* 415 U.S. 61, 90 (1974), the Supreme Court quoted "the traditional standards of *Virginia Petroleum Jobbers"* on irreparable injury:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

A corollary of this principle is that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). Similarly, "[t]he usual time and effort required to pursue an administrative remedy does not constitute irreparable injury." *Randolph-Shephard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986).

Despite these well settled principles, petitioners premise their stay petitions on unsubstantiated and speculative allegations of injury and the expense and inconvenience of pursuing the remedies we have adopted, continued negotiation and, if necessary, arbitration. As the judicial precedents cited above clearly establish, neither of these contentions establish irreparable injury.

In its July 2 stay petition, CSX contends that, absent a stay, Rail Labor "*may* argue that the consolidation has to be undone;" or "*could* assert" that there was no ICC authority for the consolidation, or "*may* threaten a strike" (p. 2, empahsis added). Similarly, N&W asserts in its July 2 petition that "It *may* . . . *be suggested* that . . . the carriers now have an obligation to restore the *status quo ante*" (p. 9, emphasis added). Rail Labor responded (July 9 Response 8):

> [T]he claims of irreparable injury are based upon a possible strike, or return of the former separate operations to the *status quo ante* the transfers of work, etc. These claims of irreparable injury are wholly speculative and can be nothing more than that until [CSX and N&W] enter into negotiations . . .

We agree that petitioners have failed to demonstrate their feared injury is so real or imminent as to warrant the imposition of a stay delaying resolution of these proceedings.[4]

The likelihood that the transactions would ever have to be undone is diminished by the fact that, as petitioners correctly note, we did not find that the transactions were contrary to the standards that we enunciated in the June 21 Decision. As we stated (6 I.C.C.2d at 722), we were unable to affirm the arbitrators' implementation of those transactions because the arbitrators "based their decisions on pronouncements that the *Carmen* court found to be incorrect statements of the law and that we modify in this decision . . . ". The parties, and any arbitrators selected by the parties, are to be guided by the principles in the June 21 Decision. If, as petitioners contend, the transactions conform to those principles, there should be no need for any undoing of those transactions.[5]

The speculative nature of a potential strike is shown by the fact that there has been no threat, the remand was to the parties to "continue the implementing process *pursuant to Section 4 of*

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[4] We certainly could not endorse N&W's suggestion that we wait until the Supreme Court reviews *Carmen* in Nos. 89-1027 and 89-1028 *and* all subsequent administrative and judicial proceedings are completed. We considered the Supreme Court's grant of the writs of certiorari when we issued the June 21 Decision and noted our own participation in the Supreme Court proceedings. 6 I.C.C.2d at 756 n.34. We obviously made a determination at that time that the public interest was better served by issuing the June 21 decision despite the pending Supreme Court review. N&W mentions no subsequent events that should influence us to reverse that determination. In fact, there are indications that resolution by the Supreme Court has become more indefinite. That Court has suspended briefing until October 1990 (Rail Labor Response at 5-6). Even if certain procedural objections to those proceedings are overcome and the Court hears argument on the merits of *Carmen*, the Court may not resolve the dispute. The last time the Supreme Court considered an ICC consolidation case involving labor issues, the Court did not reach the merits, but vacated the court of appeals' decision on procedural grounds. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987).

[5] N&W assumes (July 21 Petition 9) that a remand directly to an arbitrator would remove uncertainty as to any undoing. Since, as we will discuss below, the arbitrator in the N&W proceedings has opined that an arbirtrator loses jurisdiction to rule on the merits once he renders his award, we believe that assumption is illusory.

the [Commission's] New York Dock conditions" (6 I.C.C.2d at 722, emphasis added), and Rail Labor has cooperated in abiding by the procedures established under the Commission's labor protective conditions throughout these extended proceedings.[6]

CSX finds irreparable harm in being "forced to engage in additional negotiations and arbitration . . . requir[ing] further expenditures of time and the limited resources of the parties . . . " July 2 Petition 10-11. N&W also finds irreparable injury in being required to negotiate with Rail Labor or "rearbitrate." July 2 Petition 5. But these are precisely the type of litigation or administrative expenses that the Supreme Court and the D.C. Circuit found did not constitute irreparable harm in the cases cited above. These expenses arise in connection with any decision that may be appealed or further litigated through appeal or remand. Accordingly, petitioners have not demonstrated that they will suffer irreparable injury in the absence of a stay.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

Petitioners have not made a strong showing that they are likely to prevail on the merits. While we are not here disposing of the two July 11 petitions seeking reopening, reconsideration, or clarification of the June 21 Decision, we will consider the allegations of error in those petitions to determine whether a substantial case on the merits has been made by petitioners.

CSX (Pet. for Recon. 7-8) and N&W (Pet. for Recon. 4-9) contend that the Commission committed material error when it failed to explain why the arbitration awards that were vacated did not meet the standards established in the June 21 Decision. As we have indicated above and at 6 I.C.C.2d at 722, we vacated the awards, not because we found them wanting under our newly-announced standards, but because the arbitrators in both decisions rested their awards on statements that the *Carmen* court found to be incorrect (see 6 I.C.C.2d at 729-30) and upon

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[6] Rail Labor states in its July 19 Response (p. 3, emphasis in original):

> *If* at a future date events indicate that the carriers' speculation are about to be proved correct, they will have adequate remedies in the courts at that time, particularly in the court before which they will be appearing on review of the Commission's June 21, 1990 decision.

which we accordingly did not rely in our decision on remand (see 6 I.C.C.2d at 750-54). We fully articulated the reasons why we could not uphold the arbitrators' rulings.

We could have applied the new standards ourselves to the implementing agreements. We chose not to do so, however, because we believed this would diminish the freedom of the parties to negotiate as well as the role of arbitrators, upon whose expert guidance we intend to place great reliance. See discussion, 6 I.C.C.2d at 721-22, 753 n. 31. We stated there that we were relying on the experience of arbitrators, management and labor to properly implement the new policy, balancing the rights and accommodating the needs of labor and management. 6 I.C.C.2d at 721. We did not abuse our discretion by remanding these two transactions for further consideration by the parties most directly involved.[7]

N&W has a related procedural complaint (Pet for Recon. 18-20) about our remand "to the parties" (with arbitration, if necessary, 6 I.C.C.2d at 757) rather than directly to an arbitrator. According to N&W, "potential uncertainty" would be removed by remanding to the arbitrator responsible for the N&W implementing agreement, Referee Harris (Pet. at 19). In light of Referee Harris' recent statements in Finance Docket No. 30965, *Delaware and Hudson Railway Co., —Lease and Trackage Rights Exemption—Springfield Terminal Co.*, it appears to us that direct remand to the arbitrator could well create greater uncertainties. In an arbitration award filed March 13, 1990, in that proceeding, Referee Harris had the following comments on a remand to an arbitrator (p. 41):

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[7] N&W argued as a further reason why the arbitrator's award in its case (the Harris award) should not be vacated that "the Harris award did not modify any contractual rights actually possessed by [the union]." Pet. for Recon. 6-8. Nevertheless, it appears clear that Referee Harris thought that contractual rights were being modified (see 6 I.C.C.2d at 727-28) and that the Commission believed an agreement was being modified (6 I.C.C.2d at 728-29), and that the *Carmen* court assumed the same (880 F.2d at 565). An argument that there was, in fact, no contract modification involved would appear to be most appropriately presented at the arbitration level, if the parties are unable to arrive at an agreement without resort to arbitration.

> Arbitrators, unlike judges, do not have award. "At common law, an arbitrator did not have authority to modify or correct an award once it had been rendered, because of the doctrine of *functus officia*; i.e. having rendered the award, the arbitrator's task has been fulfilled. Similarly, an arbitrator had no authority to commence a subsequent hearing." [Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Ed. (1983), at pp. 579-80.]
>
> While this general rule has been modified to allow for technical corrections such as correction of miscalculation of figures, mistakes in description, removal of portions of an award which exceeded the submissions, and corrections as to form, corrections may not be made in the merits of the award.

We are not accepting the foregoing statement as necessarily an accurate statement of the law, or as one binding upon the Commission in its dealings with arbitrators. We could not ignore this declaration, however, when made by one of the two arbitrators involved in these proceedings (a former Chairman of the Federal Mediation Board, as noted by N&W, July 2 Pet. 8 n. 8). It appeared to us when we decided this case that Referee Harris might decline a direct remand, leading to further delay. Pursuant to our June 21 Decision, the parties are free to seek arbitration as soon as negotiations reach an impasse.

CSX (Pet. to Recon. 8) and N&W (Pet. to Recon. 18) complain that we have not supplied adequate guidance for the parties or arbitrators. We are disappointed that petitioners are unable to discern sufficient guidance in our extensive decision. We commend to their attention particularly the "Summary of Conclusions," 6 I.C.C.2d at 718-22, and "The Problem Today - Our Resolution," 6 I.C.C.2d at 645-54, where we set forth standards

that we believe are more than adequate to guide arbitrators and the parties.[8]

N&W devotes a substantial portion of its Petition for Reconsideration (pp. 9-13) to the following alleged error (p. 10):

> The Commission apparently sees the Art. I, §2 requirement that collective bargaining rights be preserved as a device that may, in some contexts, grant to a union representing a group of employees of one railroad in a merged system the right to impose its contract on another railroad in the system.

N&W fails to furnish any citation to the June 21 Decision in which this proposition is stated. N&W does include two citations to that decision on the same page as the quotation, but N&W indicates that it agrees with the Commission in both instances. Since the Commission did not make the statement that N&W finds objectionable (as N&W seems to concede, using the terms "apparently," "may, in some contexts") in the June 21 Decision, we cannot find that N&W has made a substantial case for reopening and reconsideration of that decision on this basis.

Finally, both N&W (Pet. for Recon. 14-18) and CSX (Pet. for Recon. 4-7) assert that the Commission erred materially in its treatment of Section 11341(a), discussed in the final three pages of the June 21 Decision (6 I.C.C.2d at 754-56). If we understand the argument, petitioners disagree with our suggestion of a relationship between Section 11341(a) and Section 11347 (6 I.C.C.2d at 754); "We submit that Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA [Railway Labor Act] at least to the extent of our authority

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[8] Rail Labor's comments on a related issue are relevant here (July 9 Response 4):

> Both carriers complain that the Commission was in error in not making specific findings as to the failure of each of the disputed awards to meet the criteria now posited by the Commission. Such complaints denote a carrier view of the Commission's decision in these cases as changing nothing; that the references throughout the Commission's opinion to the importance of preserving collective bargaining is so much meaningless verbiage . . .

under §11347." Petitioners maintain that our authority is significantly broader and overcomes all legal obstacles including collective bargaining agreements (CBAs).

We fail to see how petitioners' view of the law constitutes a substantial case for reconsidering and modifying the June 21 decision. First, we ruled in that decision that CBAs could be modified pursuant to Section 11347, and did not rely on Section 11341(a) for that power. We found that our power under Section 11341(a) "reinforces" our authority under Section 11347, but "in accordance with the opinion of the Court of Appeals, we do not rely on §11341 as a basis for effecting modification of CBAs." 6 I.C.C.2d at 756. Since we did not rely on Section 11341(a), we question whether petitioners' objections even involve the "merits" of the June 21 decision. More significantly, they appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

Secondly, petitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n. 34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a).[9] Until such time,

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[9] We do not disagree with the following statement of CSX (July 2 Pet. 8), but we cannot find it to be the type of challenge to the merits of the June 21 Decision that would justify a stay of that decision:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

we see no basis for petitioners' assertion that our discussion of Section 11341(a) in the June 21 Decision is in error. We fully considered these matters prior to issuance to our decision. We concluded that this was an insufficient reason to withhold the guidance to participants in railroad consolidations provided by our decision so that such transactions may go forward in the interim. Accordingly, petitioners have failed to demonstrate that there is a strong likelihood that they will prevail on the merits or even establish a substantial case on the merits.

III. HARM TO OTHERS

The harm to other interested parties is not a substantial factor here. CSX reports that the employees covered by the Orange Book were never transferred (July 2 Pet. 4). Only two employees who moved in the N&W transaction are still employed, the remainder having retired (July 2 Pet. 8 n. 8).

IV. THE PUBLIC INTEREST

The final hurdle for petitioner to overcome is to demonstrate that the public interest supports the granting of a stay. In our view the public interest requires that the petitions for stay be denied.

The significance of this factor was discussed in *Virginia Petroleum*, 259 F.2d at 925:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Furthermore, it is a "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *American Power and Light Co. v. SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 194 (1941). In deciding whether to stay a Commission decision, a court will not substitute its judgment for that of the Commission in determining where the public

interest lies. *Atchison, Topeka and Santa Fe Railway Co., v. Wichita Board of Trade,* 412 U.S. 800, 825 (1973).

The Commission has conducted an extensive proceeding, involving the submission of briefs and oral argument before the full Commission, and we issued a lengthy opinion in furtherance of the public interest. We described the period of "essentially harmonious relationship between management and labor" prior to the 1980's (6 I.C.C.2d at 720, 740-745) and the subsequent period of conflict over the commands of the Interstate Commerce Act and the Railway Labor Act leading to substantial litigation (6 I.C.C.2d at 745-52). We explained the factors that we believed

> altered the balance between labor's legitimate right to bargain collectively under RLA procedures over changes in pay, rules and working conditions and management's need to implement operating changes to achieve the benefits of consolidation. 6 I.C.C.2d at 752.

We then said (*id.*) "We hope to restore that balance here." We do not know if we will be successful in our attempt to restore some harmony to labor-management relations in the all-important area of rail consolidations through the standards enunciated in the June 21 Decision, but we strongly believe our proposals should be tried. Acceding to petitioners' request for a stay would mean that the anticipated benefits to the railroad industry, labor, and the general public they serve would be indefinitely delayed. In our view, the public interest strongly requires that our proposals be applied now by rail management, labor and arbitrators. Moreover, as we have indicated, we believe the public interest strongly supports providing the guidance afforded by our June 21 Decision so that the sorts of transactions covered thereby may go forward pending review by the Supreme Court of the issues complained of by petitioners.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay are denied.

2. This decision is effective on July 20, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Lamboley commented with a separate expression.

Sidney L. Strickland, Jr.
Secretary

COMMISSIONER LAMBOLEY, commenting:

I do not share the views expressed concerning the appropriateness of remanding this matter to the parties rather than to the arbitrator whose decision was at issue on review.[1] Where the Commission in reviewing a specific arbitral award finds error or other reason for remand it is proper to remand that award back to the arbitrator. This would avoid the procedural and substantive problems experienced in *Springfield Terminal.*[2]

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[1] In one sense, an arbitrator acting under the authority of conditions imposed by the Commission pursuant to the Interstate Commerce Act — i.e., under the authority delegated by the Commission — is our agent, akin in standing to an ALJ.

[2] See FD No. 30965, *Delaware and Hudson Railway Company - Lease and Trackage Rights Exemption - Springfield Terminal Railway Company,* decisions served October 26, 1989, December 12, 1989, December 20, 1989 and January 9, 1990.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED
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CLERK OF THE UNITED
STATES COURT OF APPEALS

No. 88-1724

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents.

No. 88-1694

AMERICAN TRAIN DISPATCHERS' ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS FOR REVIEW OF ORDERS OF
THE INTERSTATE COMMERCE COMMISSION

PETITION IN SUPPORT OF
MOTION FOR ORDER TO INTERSTATE COMMERCE
COMMISSION TO CONFORM DECISION ON REMAND
TO PRIOR COURT OF APPEALS DECISION

Petitioners in this action the Brotherhood of Railway Carmen — Division of TCU and the American Train Dispatchers' Association (hereinafter "BRC", "ATDA" or "Petitioners") hereby submit this petition in support of their motion for a Special Writ to require the Interstate Commerce Commission ("ICC" or

"Commission") to conform its June 21, 1990 ruling in *CSX Corp. — Control—Chessie and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715 (1990) (the "Commission's June 21 decision") to the judgment of this court in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) ("*Carmen*") *cert. granted*, Supt. Ct. Nos. 89-1027 and 89-1028 (March 26, 1990).[1] Petitioners respectfully submit that the Commission's June 21 decision is plainly contrary to this court's express findings and rationale in the *Carmen* case on the ICC's authority to abrogate Railway Labor Act agreements.

BACKGROUND

a) The Carmen Decision

On July 25, 1989 this Court entered its decision in the *Carmen* case. That decision involved petitions from the ATDA and BRC for review of separate orders from the ICC concerning the ICC's authority to exempt a carrier which is party to a merger or consolidation "between railway carriers subject to approval under §11344 of the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* (the Act), from the provisions of (1) Collective Bargaining Agreements (CBA); and (2) the Railway Labor Act, 45 U.S.C. §151, *et seq.*" 880 F.2d at 563.

The *Carmen* case arose from two separate consolidations involving holding companies and rail carriers within the CSX Transportation, Inc. family ("CSX") and between rail carriers within the Norfolk Southern Corporation family ("NS"). In accordance with Section 11347 of the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* ("ICA"), the Commission imposed on these transactions its standard labor protective conditions applicable to railroad consolidations as set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). It was the Commission's review of

[1] ATDA and BRC have moved for dismissal of the Supreme Court case as "moot" based at that time on the Commission's announcement of its then forthcoming decision on remand in the *Carmen* case. After consideration of such motion, and the responses thereto, the Supreme Court has deferred consideration of the motion for 120 days as well as further briefing on the merits.

the awards of arbitrators acting under these ICC imposed labor protective conditions which gave rise to the *Carmen* decision.

Specifically, approximately 5-6 years after the CSX and NS consolidations were consummated, the carriers separately decided to close certain facilities on their systems and to transfer the work and some of the affected employees to other locations on their rail system. These actions were subject to the *New York Dock* protective conditions imposed on the consolidations and pursuant to Article 4 of the *New York Dock* conditions, arbitrators were appointed by the National Mediation Board to devise implementing agreements which would outline the manner and methods by which the employees would be combined at the transferee work locations. In devising their respective implementing agreements the arbitrators, in essence, found that they, acting as agents for the ICC, had the power to abrogate provisions of collective bargaining agreements negotiated under the Railway Labor Act, 45 U.S.C. §151, *et seq.* ("RLA") as well as any other provision of the RLA, to the extent that these provisions inhibited the operational changes sought by CSX and NS.

The Commission, on petitions for review, upheld the arbitrators findings, and in the CSX arbitration even went beyond the arbitration decision by reversing the determination not to abrogate the provisions of a collective bargaining agreement prohibiting the transfer of employees (i.e., the "orange book").

In defending its decision to abrogate collective bargaining agreements which impeded the railroads operational transfer, the Commission relied upon Section 11341(a) of the ICA. That section exempts a railroad participating in an ICC-approved transaction "from the antitrust laws and from all other law, including State and municipal law, as necessary to let the person carry out the transaction . . ." 49 U.S.C. §11341(a).

This Court, after careful consideration of the legislative history of the ICA generally and Section 11341(a) specifically, as well as the history and purposes of the RLA concluded that Section 11341(a) "does not grant the ICC, its claimed power to override provisions of a CBA between a carrier and its employees." 880 F.2d at 573. This resolved the first issue before the court.

The second issue, which pertained to the ICC's power under Section 11341(a) to override RLA provisions that arguably impede mergers, was remanded to the ICC "in order that the agency may determine whether further proceedings are necessary." *Id.* The Court then addressed each petition on remand separately. With respect to the CSX matter, the Court reasoned that "the heart of the dispute before the ICC" was whether the collective bargaining agreement could be abrogated so that employees and work could be transferred in the operational consolidation; thus the RLA was implicated to the extent that its procedures must be followed and a new agreement reached before employees or work could be transferred. This Court then found that (880 F.2d at 573):

> Because the ICC, in response, started from a premise (that §11341(a) gave it the power to relieve CSX of its contractual responsibilities) and reached a conclusion (that the RLA could not stand in the way of that power) that we hold was in error, it appears that nothing turns any longer on its conclusion. We remand the record to the ICC for reconsideration, however, in order to enable it to assess the situation in the first instance.

Addressing the operational transfer at NS, the Court then considered the outstanding RLA issues finding that here too the effect of its ruling that the Commission could not abrogate the collective bargaining agreement may, for practical reasons having to do with administering the agreement in a location where there would be both covered and uncovered employees, moot any live RLA issue. *Id.* The court concluded by stating (*Id.*; emphasis supplied):

> In light of this uncertainty as to the effects of our ruling on the continued vitality of the disputes before us, we think it best to remand them for the ICC to determine *whether there is any live RLA issue remaining*. Should the ICC determine that further proceedings are necessary on the RLA issue, it should, on remand, either provide an explanation for its new position on that issue, or adhere to its prior position.

b) The Commission's Decision On Remand

In an order dated September 20, 1989, the Commission reopened the proceedings which led up to the *Carmen* decision. *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, (not printed), served September 20, 1989. In so doing, the Commission announced its "intention to conduct a comprehensive examination of our authority under 49 U.S.C. §§11341, 11343 and 11347, etc. and the labor conditions we have customarily imposed in approving railroad consolidations."[2]

After consideration of the briefs of interested parties, including the BRC and ATDA, and after a hearing, the Commission, on June 21, 1990, issued its long-awaited decision on remand. Attached hereto as Exhibit 1. By way of a preface to its findings, the Commission summarized its conclusions in the following manner (6 I.C.C.2d at 718):

> First, any merger or consolidation of significance will require the modification of existing CBAs to carry out the transaction. Second, the procedures of the RLA are incompatible with the efficient consummation and effectuation of a merger or consolidation. The third, and perhaps most significant, proposition established here is that this dilemma was recognized by the industry more than 50 years ago and resolved through agreement between rail labor and management.

The Commission characterized the issue remanded to it by this Court as, "whether §11341(a) may operate to override the provisions of the RLA." Commission Decision at p. 754. Addressing this issue the Commission stated (*Id.*):

> Despite some labor suggestions to the contrary, we do not believe the Commission is prevented by the

[2] After issuance of the *Carmen* decision, petitions for rehearing and rehearing *en banc* were filed with the court by NS and CSX with the Commission filing a petition for rehearing only. The court denied, by order dated September 29, 1989, the petitions for rehearing and rehearing *en banc* from NS and CSX. Consideration of the Commission's petition for rehearing, however, was deferred pending release of the ICC'S decision on remand. Subsequently, the ICC in a motion served June 28, 1990, and after the issuance of its decision on remand, has moved the court for an order withdrawing its petition for rehearing.

> *Carmen* decision from finding that §11341(a) may displace Railway Labor Act procedures (that decision found no exemption for "contracts" because that term, unlike "law" does not appear in §11341(a)). We submit that Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA at least to the extent of our authority under §11347. Thus we consider our §11341(a) authority in the context of mergers and consolidations a "mirror image" of our §11347 power. To the limited extent (as described in this decision or established by arbitrators) that we are able to act under §11347, we are also able to foreclose resort to RLA procedures.[3]

Relying on several grounds for this conclusion, the Commission indicated that its sources of authority were: (1) the language of Section 11341(a) and in particular that portion which exempts ICC approved transactions "from the antitrust laws and from all other law"; (2) the legislative history of the 1978 recodification of the ICA which in the interests of eliminating redundancy, according to the ICC, substituted the language "all other Federal law" for the former clause in Section 5(12) which stated "of all of the restraints, limitations, and prohibitions of law, Federal, State or municipal"; and (3) several court of appeals' decisions, considered by this Court in the *Carmen* decision including *Brotherhood of Locomotive Engineers v. C&NW*, 314 F.2d 424, 431-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) and

[3] With respect to this finding, Commissioner Lamboley who concurred in part and dissented in part, observed:

> As noted, while apparently accepting the holding of the D.C. Circuit which denies Commission authority under the ICA to alter provisions of existing CBAs in order to implement approved transactions, the majority now defines the present problem in terms of preempting RLA procedures. This characterization sidesteps the court's ruling, but thereby creates the anomalous reasoning that while CBAs themselves may *not* be abrogated, the RLA procedures for which the CBAs have been ultimately derived may be preempted. For me, this is simply doing indirectly that which cannot be done directly. 6 I.C.C.2d at 758-759 (emphasis in original); *see* footnote 3, infra.

a concurring opinion in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). 6 I.C.C.2d at 755.

The Commission conceded that its "assertion of this power [to modify agreements under Section 11347] is fairly recent; but then quickly added that [t]he fact that the Commission has disavowed this power in the past does not mean that the agency does not have such authority." *Id.* (citation omitted).

Addressing more specifically the question of modification of collective bargaining agreements, the Commission ruled it could modify such agreements to the extent necessary to allow a transaction to be effectuated pursuant to its authority under Section 11347. 6 I.C.C.2d at 721-22.[4] As the Commission sees it, its power under Section 11341(a) "reinforces" its authority under Section 11347. 6 I.C.C.2d at 756.

In what it considers to be a departure from its post-1983 decision, the Commission states that henceforth "only those changes in CBAs necessary to permit an approved transaction will be appropriate." 6 I.C.C.2d at 749. It is the Commission's opinion that this is the way things used to be done in mergers and consolidations in the past and that such approach reflects a "synthesis" between the RLA and ICA. *Id.* The Commission points to the "Washington Job Protection Agreement of 1936" as an example of such a synthesis. 6 I.C.C.2d at 741-42. In so doing, the Commission acknowledges that its recent interpretation, from 1983 onward, of its authority to override agreements was a departure from its prior position. 6 I.C.C.2d at 720-722, 752.

As the Commission acknowledges, (at 6 I.C.C.2d at 753) all this but particularly the Commission's new found assertion of its Section 11347 authority, must be considered in light of this court's guidance that, "we think it best for the ICC, if it has not abandoned its §11347 and §4 rationales altogether, to reconsider them in the first instance in light of the Supreme

[4] Commissioner Lambolely commented on this rationale by stating:

> Legally, §11347 does not provide the scope of authority urged in this decision to support its procedural or substantive determination . . . The basic authority to do that must be found in §11341(a) and that is truly at issue. Commission Decision at p. 774.

Court's intervening decision in *P&LE [Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 105 L. Ed.2d 415 (1989)] rejecting the ICC's related position." 880 F.2d at 754. In the Commission's view, "P&LE is factually distinguishable" because there no labor protections were imposed and Section 11347 was not involved. 6 I.C.C.2d at 753. Therefore, according to the Commission, its current position that Section 11347 permits the modification of RLA agreements "is not inconsistent with that case." *Id.* It is asserted that the current ICC approach of overruling collective bargaining agreements to the extent necessary to allow a transaction to be effectuated, is consistent with the *P&LE* decision because it represents "an accommodation of the two statutes." *Id.* at 754.[5]

In concluding, the Commission reversed and vacated the arbitration awards which had given rise to the original petitions, and then "remanded to the parties to continue the implementing process in accordance with Section 4 of the *New York Dock* conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision." 6 I.C.C. 2d at 757.

C) Subsequent Developments Since The Commissions' June 21 Decision

Both NS, through its subsidiary carriers Norfolk and Western Railway and Southern Railway, and CSX filed petitions on July 2, 1990 with the ICC to stay the June 21 decision. NS sought a stay pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v. American Train Dispatchers Association*, Sup. Ct. No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, Sup. Ct. No. 89-1028. NS also, as did CSX, sought, on July 11, 1990, a stay pending disposition of a petition for reconsideration of the June 21 Commission

[5] In response, Commissioner Lamboley states:

> This is *not* a case which harmonizes "complementary regimes." Rather, in claiming preemption authority under §11347 its logic creates conflict both *internally* between §2 and §4 of the New York Dock conditions, and *externally* between the ICA and the RLA statutes, all of which flow from the common origins and public purposes." 6 I.C.C.2d at 744 (emphasis in original).

Decision. On July 11, 1990, NS and CSX filed petitions for a stay pending judicial review.

In a decision served on July 20, 1990, the Commission denied the petitions for stay filed by CSX and NS.

ARGUMENT

THE COMMISSION'S JUNE 21 DECISION FAILED TO COMPLY WITH THIS COURT'S REMAND ORDER AND CONSEQUENTLY IT SHOULD BE SET ASIDE AND THE COMMISSION DIRECTED TO ONLY TAKE SUCH FURTHER ACTION AS IS CONSISTENT WITH THE ORDER OF REMAND

This is one of those narrow class of cases where issuance of a Special Writ, pursuant to the court's jurisdiction under the All Writs Act, 28 U.S.C. §1651(a)[6], is "necessary to confine a lower court [here the Commission] to the terms of an appellate tribunal's mandate."[7] *Will v. United States* 389 U.S. 90, 95-96 (1967). On partial remand from this court's decision in the *Carmen* case, the Commission has ruled that it may abrogate RLA collective bargaining agreements to permit a railroad merger or consolidation subject to its jurisdiction to be carried out. 6 I.C.C.2d at 718, 721, 722, 749 ("changes in CBA is necessary to permit an approved transaction will be appropriate"), 750, 752, 754. Such findings, petitioners submit, are directly contrary to both the "letter [and] spirit"[8] of the court's mandate in the *Carmen* decision. Thus, while the holding in *Carmen* was based on the

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[6] 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

[7] Because this case concerns the Commission's decision on remand of the record from the court of appeals, that line of cases which provides that a special writ is not available unless it is demonstrated that appeal is an inadequate remedy and irreparable harm would result (*see* e.g., *In Re Thornburgh*, 869 F.2d 1503, 1507 (D.C. Cir. 1989) is inapplicable. That doctrine does not apply to cases on remand.

[8] *Mid-Tex Electric Cooperative, Inc. v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987), *quoting, City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. (1977)) ("City of Cleveland").

Commission's authority under Section 11341(a), the court made plain that "we can not impute to Congress the intention to make the bargained-for provisions of a CBA contingent upon their not later becoming inconvenient to the full realization of operating economies that a merger might make possible . . . *We simply do not think that Congress has lodged any such power in the ICC, . . .*" 880 F.2d 570. (citations omitted) (emphasis supplied).

It is well established that a decision of a federal appellate court "establishes the law binding further action in the litigation by another body subject to its authority."[9] *City of Cleveland*, 561 F.2d at 346; *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. The rule of these cases has been uniformly followed in later days . . . [and] We do not see how it can be questioned at this time"); *United States v. United States Dist. Court*, 334 U.S. 258, 263-264 (1948) ("It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court"). Under this doctrine the lower court, or in this case the Commission, "is without power to do anything which is contrary to either the letter or the spirit of the mandate construed in the light of the opinion of [the] court deciding the case." *City of Cleveland* supra at 346, *quoting, Yablonski v. UMW*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). Thus, as petitioners have shown above, this court's exercise of authority under the All Writs Act "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision." *City of Cleveland* at 346 quoting *Yablonski* supra at 1038. Moreover, it is beyond doubt that these principles are as equally applicable to review of an administrative agencies' decision as they are to review of the actions of a lower court. *See United Gas Improvement Co. v. Continental Oil Co.*, 381

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[9] The fact that petitions for certiorari have been granted, although a decision on Rail Labor's Motion To Dismiss has been deferred until October, as has further briefing on the merits, has no impact on this court's authority to require the Commission to conform its decision on remand to the dictates of the *Carmen* decision. *See United States of America v. United States District Court*, 334 U.S. 258, 263 (1948); *National Labor Relations Board v. Holyoke Water Power Co.*, 793 F.2d 18 (1st Cir. 1986).

U.S. 392, 406 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, (1940); *City of Cleveland* at 346 ("These principles, so familiar in operation within the hierachy of judicial benches, indulge no exception for reviews of administrative agencies").

Thus, when this court addressed the scope of its partial remand to the Commission, it expressed strong doubt that as a result of its ruling, that the Commission could not modify RLA agreements under Section 11341(a) of the ICA which had the result of limiting how the carriers could proceed with their operational consolidation, there was "any live RLA issue remaining." 880 F.2d 573.[10] On remand, however, the Commission has undertaken an expansive review of its authority "under 49 U.S.C. §§11341, 11343 and 11347, etc., and the labor conditions we have customarily imposed in approving railroad consolidations." More importantly, whereas this court specifically found that "§11341(a) does not empower the ICC to override a CBA," (880 F.2d at 572) and more generally stated "we simply do not think that *Congress has lodged any such power in the ICC*" (880 F.2d at 570) (emphasis supplied) to override collective bargaining agreements, and even though the ICC could have raised its Section 11347 argument earlier but did not, the ICC has nonetheless charged ahead, doing that which it was forbidden to do by this court, and found that it can abrogate such agreements—albeit, the ICC claims under its authority under a separate statutory provision, Section 11347.

The Commission believes that such a conclusion is not precluded by this court's ruling in the *Carmen* decision by explaining (6 I.C.C.2d at 754)[11]:

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[10] The Court, therefore, stated in pertinent part in its conclusion:

> We remand the records with respect to the ICC's RLA holdings in order that the agency may determine *whether further proceedings are necessary*. 880 F.2d 574 (emphasis supplied).

[11] Commissioner Lamboley, who concurred in part and dissented in part in the Commission's decision, commented on the Commission's claimed authority under Section 11347 by stating (6 I.C.C.2d at 774):

> Legally, §11347 does not provide the scope of authority urged in this decision to support its procedural or substantive determinations . . . The basic authority to do that must be found in Section 11341(a) and that is what is truly at issue.

> We submit that Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA at least to the extent of our authority under §11347. Thus we consider our §11341(a) authority in the context of mergers and consolidations a "mirror image" of our §1347 power. *To the limited extent* (as described in this decision or established by arbitrators) *that we are able to act under §11347, we are also able to foreclose resort to RLA procedures.*

Aside from the fact that the Commission has attempted to resurrect its authority under Section 11341(a) by claiming that it retains authority to preempt RLA procedures[12], as opposed to contracts, and besides the fact that in a none to subtle way the Commission has also attempted to cling to its Section 11341(a) authority by marrying it to Section 11347 and stating that it is the "mirror image" of that provision, remarkably, the Commission has relied on a provision of the ICA for which this court has already observed it lacks such authority. While this court did not reach the merits of the ICC's Section 11347 argument that it displaced Rail Labor's RLA rights, the Court made plain its views indicating that on remand, 880 F.2d at 574 (emphasis supplied).

> In any event, *we think it best for the ICC, if it has not abandoned its §11347 and §4 rationales altogether*, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.

In sum, the Commission in its decision on remand has come to precisely the same result as that to which it was reversed by this court in *Carmen*. To be sure, the Commission pays lip

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[12] On this point Commissioner Lamboley observes (6 I.C.C.2d at 758-59):

> As noted, while apparently accepting the holding of the D.C. Circuit which denies Commission authority under the ICA to alter provisions of existing CBA's in order to implement approved transactions, the majority now defines the present problem in terms of preempting RLA procedures. This characterization sidesteps the court's ruling, but thereby creates the anomalous reasoning that while CBAs themselves may not be abrogated, the RLA procedures from which the CBAs have been ultimately derived may be prempted. For me, this is simply the idea of doing indirectly that which cannot be done directly.

service to the *Carmen* decision and professes adherence to its mandate while explaining that its authority to modify agreements is now based on Section 11347, but the Commission cannot discard its Section 11341(a) authority completely and therefore argues that Section 11347 is its "mirror image." Reduced to its essence, this is because the necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA, must be Section 11341(a) and this court has already addressed the scope of that section's authority with respect to RLA agreements. Moreover, as petitioners have argued in briefs to this court in the *Carmen* case, Section 11347 *preserves* collective bargaining agreements and therefore cannot, under any circumstances, provide the justification for their abrogation. *See* Opening Brief in Case No. 88-1694 at 21-29; Opening Brief in Case No. 88-1274 at 20-31, Reply brief at 16-20. Thus, the ICC's action on remand is at its root no more than an exercise in supplying reasons to support a pre-ordained result.[13] Moreover,

[13] Nor can the Commission credibly contend that its decision on remand represents a return to its prior position concerning the interface of the RLA and ICA in the context of mergers and consolidations, for it has done no such thing. Indeed, the Commission's review of its prior handling in this area exhibits a revisionist approach to such history, is rife with misstatements and unsupported assumptions and is, in any event, based only on assumption.

Thus, for example, the Commission, 6 I.C.C.2d at 740, states that for the period between 1940-80 "the disruptive effect on labor [from mergers and consolidations] *appears* to have been successfully handled through WJPA-type negotiation and aribtration" (emphasis supplied). In fact, such "disruptive effect" was resolved through direct negotiation between labor and management of attrition agreements and no thought was given to arbitration. This fact was recognized by Referee Harris who rendered the decision in the "Dispatchers Arbitration" reviewed by this court in the *Carmen* case. Referee Harris clearly stated, "Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules or working conditions had never been raised *in a Section 4 proceeding.*" 6 I.C.C.2d at 727. (emphasis added) The ICC responded, in just one example of the many unfounded assumptions it makes concerning prior handling of mergers, "[t]his could be interpreted as indicating that arbitrators did not make such changes before 1981, but an equally plausible reading is that such changes were made and not challenged." 6 I.C.C.2d at 743, n.19. At another point, on the key issue of prior handling of RLA agreements by arbitrators the Commission states, *"we assume* they did what was necessary to carry out the merger . . . [and contracts] were *evidently* changed without resort to RLA procedures." 6 I.C.C.2d at 743. In short, the Commission's professed return to its prior policy is built upon unsupported assumptions which, in turn, are relied upon to reach inaccurate conclusions.

such results and reasons are directly contrary to this Court's decision in *Carmen* and the remand order therein.

Furthermore, this case is similar to other decisions of this court directing an agency to comply with the court's mandate and order of remand. Thus, in *City of Cleveland* the Federal Power Commission took an overly narrow reading of the court's order of remand for further rate proceedings, as the ICC has here in interpreting this court's ruling on the extent of its authority under Section 11341(a) and its ability to abrogate RLA agreements, and the court rejected the agency's interpretation stating, "the basic issue presented and decided loomed much larger." 561 F.2d 347. Indeed, the court opined, in a statement which petitioners submit has equal weight here, that (561 F.2d at 348 (citations omitted)):

> [t]he law of the case; . . . when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of the case, applies to everything decided, either expressly or by necessary implication.

Similarly, in *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026, 1033 (D.C. Cir. 1983) in which, like here, an action was brought against the Commission for failure to comply, (*i.e.*, by delay) with a court order on remand, this court found that such delay violated, in part, its earlier mandate and ordered the Commission to reach a decision in reasonable time.[14] While the Commission's extended delay in the *PEPCO* case was certainly contrary to the court of appeals' remand order, that case, Petitioners submit, presents a less serious departure from the court's mandate than this one. *See also, American Trucking Association, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982) (court of appeals enforces prior mandate by mandamus where rules and

[14] More specifically, the court rested its findings of jurisdiction on alternative grounds stating (702 F.2d at 1033):

> In summary, we find that the question whether the Commission has unreasonably delayed reaching a final decision is properly before us, either because such delay violated our earlier mandate or because it jeopardizes our future review of the final Commission decision.

policy statement adopted by ICC were found to be contrary to Motor Carrier Act of 1980 as interpreted in prior opinion).

In sum, the Commission is so committed to the result that it can modify RLA agreements, that its decision on remand flies in the face of this Court's mandate in *Carmen*. The Commission's thinly veiled contention that this authority is now based on Section 11347 of the ICA is contrary to logic, because Section 11347 does not, in itself, provide preemption authority, and the Commission's own statement that "Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA at least at the extent of our authority under §11347." 6 I.C.C.2d at 754. Such flagrant disregard for findings of the *Carmen* decision mandate that this Court exercise its authority under the All Writs Act. Accordingly, the Commission must be required to conform its decision on remand to the court's findings in *Carmen*.

CONCLUSION

As the foregoing establishes, the Commission has on remand clearly and plainly exceeded this court's findings in the *Carmen* case. Accordingly, the court should issue an order vacating the Commission's June 21 decision on remand and requiring it to comply with the finding in the *Carmen* decision.

Respectfully submitted,

/s/ WILLIAM G. MAHONEY
WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
RICHARD S. EDELMAN
DAVID J. STROM

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners
ATDA and BRC

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